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BRIEF-JONES/MM

(2)

NO. 91-1499

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

DAVID A. JONES AND CATHERINE M. JONES,

Petitioners,

vs.

MELLON BANK, N.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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APRIL 13, 1992

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I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

A. QUESTION:

WHETHER THERE WERE ANY GENUINE ISSUES OF MATERIAL FACT PRESENTED BY THE PLEADINGS AND EVIDENCE BEFORE THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA TO WARRANT DENIAL OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AS A MATTER OF LAW?

ANSWER:

Answered in the negative by the courts below.

B. QUESTION:

WHETHER THE PETITIONERS WERE AFFORDED DUE PROCESS OF LAW IN THIS MORTGAGE FORECLOSURE ACTION?

ANSWER:

Answered in the affirmative by the courts below.

II. COUNTERSTATEMENT OF THE CASE

This case involves a simple mortgage foreclosure action. Petitioners borrowed money from Respondent as evidenced by a Note dated April 29, 1977 and secured by a Mortgage of even date on Petitioners' residence. Petitioners failed to pay their monthly installments of principal and interest when due and Respondent commenced a foreclosure action in the Court of Common Pleas of Westmoreland County, Pennsylvania at Docket Number 7157 of 1988.[1] Petitioners filed two sets of Preliminary Objections contesting, among other things, service and subject matter jurisdiction. The Preliminary Objections were overruled by the Honorable Joseph A. Hudock and the Honorable Donetta W. Ambrose on December 28, 1988 and April 6, 1989, respectively. On or about April 24, 1989, Petitioners filed an Answer and New Matter to Respondent's Complaint. Respondent replied to Petitioners' New Matter denying the defenses raised therein.

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[1]On Page 11 of the Petition for Writ of Certiorari, Petitioners claim they made all requisite payments to Respondent. Petitioner, David Jones, admitted under oath that Petitioners failed to make all of their requisite mortgage payments when due.

Following two years of discovery, during which Petitioners initiated no discovery, Respondent filed a Motion for Summary Judgment. Following argument, the Honorable Daniel J. Ackerman granted Respondent's Motion for Summary Judgment by Order of Court dated September 12, 1990. Thereafter, Petitioners filed a Cross-Motion for Summary Judgment and, after hearing, the Honorable Richard E. McCormick denied Petitioners' Cross-Motion for Summary Judgment by Order of Court dated October 26, 1990.[2]

Petitioners filed an appeal to the Superior Court of Pennsylvania claiming that the Orders entered by Judges Ackerman and McCormick constituted abuses of discretion and should be reversed. After oral argument, the Superior Court of Pennsylvania by Order dated July 29, 1991 affirmed both decisions of the Court of Common Pleas of Westmoreland County, Pennslyvania.

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[2]Petitioners' allegation there was no prejudgment hearing as set forth on Pages (i) and 9 of their Petition is a gross misstatement of the truth. After argument was scheduled on Respondent's Motion for Summary Judgment, Petitioners contacted Judge Ackerman and requested that the Court continue argument on Respondent's Motion for Summary Judgment. The Court rescheduled argument to accommodate Petitioners' schedule; however, Petitioners failed to appear at the rescheduled argument before the Honorable Daniel Ackerman. Petitioners also failed to appear for argument on Petitioners' own Cross-Motion for Summary Judgment before the Honorable Richard E. McCormick. Not only did Judge Ackerman conduct oral argument on Respondent's Motion for Summary Judgment, the Honorable Richard E. McCormick, Jr. denied Petitioners' Cross-Motion for Summary Judgement by Order of Court Dated October 26, 1990 after conducting a formal hearing on the matter.

Petitioners filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania requesting that the Supreme Court grant allocatur and reverse the decisions of the lower courts. After briefs were filed by both parties, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal.

III. REASONS FOR DENYING THE PETITION FOR WRIT

A. Petitioners Have Failed to Identify Any Special or Important Reason to Justify This Court Granting The Petition as Required by United States Supreme Court Rule 10.1.

This case involves a mortgage foreclosure action in the Commonwealth of Pennsylvania. The only questions of law pertain to the Pennsylvania Rules of Civil Procedure governing foreclosure actions and do not involve any issue arising under the Federal Constitution.

Petitioners' allegation that they were denied due process of law by not receiving a jury trial is ridiculous. The purpose of summary judgment is to avoid a time consuming and costly trial when no genuine issue of material fact exists in opposition to judgment. Both Judge Ackerman and Judge McCormick

found that the Petitioners failed to produce any evidence in support of their defenses in this case, granted summary judgment in favor of Respondent and denied Petitioners' Cross-Motion for Summary Judgment. Respondent is aware of no court in the United States of America where a trial by jury is required or permitted following the entry of summary judgment. As the facts in this case illustrate, Petitioners' claim that they were entitled to a jury trial is simply incorrect.

The Petition for Writ of Certiorari filed in this case is a verbatim recitation of the positions advanced before the Pennsylvania courts and the Questions Presented For Review are argumentative and repetitious, thus violating United States Supreme Court Rule 14.1(a). There are misstatements of fact throughout the Petition such as Petitioners' claim that they prepaid their mortgage obligation to Respondent. Petitioner David Jones admitted under oath during his deposition that Petitioners failed to pay the monthly payments of principal and interest when due to Respondent. Petitioner David Jones further admitted during his deposition that the Mortgage and note were never modified and that no document was ever signed by Respondent releasing Petitioners from their obligation to make the monthly payments on the loan.

Other misstatements include Petitioners' allegations that Respondent sold the loan to a third party. Mellon Financial Services, now know as Mellon Mortgage Corporation, is the servicing agent for Mellon Bank, N.A.. Mellon Bank, N.A., owns the subject loan, for which reason Respondent was the appropriate party to bring the mortgage foreclosure action. Petitioners made a grave misstatement when alleging that Mellon Bank, N.A. assigned the subject loan to a third party and did not have standing to bring this action.

Petitioners have also misrepresented the Pennsylvania Rules of Civil Procedure. Contrary to what Petitioners would have this Court believe on Pages 20 and 21 of their Petition, Pennsylvania Rule of Civil Procedure 1035 does not state that a judge has authority to determine what facts are genuine.[3]

Respondent believes that Petitioners have filed numerous pleadings to forestall, delay and complicate this mortgage foreclosure action and the Petition for Writ of Certiorari is no exception.

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[3]Pennsylvania Rule of Civil Procedure 1035 provides, in pertinent part, as follows:

(b) . . . the judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . .

There are no special or important reasons for this Honorable Court to grant the Petition for Writ of Certiorari or to review the well-reasoned decisions of the Pennsylvania courts.[4] Accordingly, the Petition for Writ of Certiorari should be denied.

B. The Decisions of the Pennsylvania Courts Involve No Conflict of Opinion with this Court, Are Correct and Rest on Independent Nonfederal Grounds.

Petitioners Claim that the decisions of the Pennsylvania Courts in this case are in conflict with the decisions of this Court in Connecticut and John F. DiGiovanni v. Brian K. Doehr, ___U.S. ___, 111 S.Ct. 2105, 115 L.Ed 2d 1, (1991). In Doehr, a Connecticut statute which authorized a judge to allow prejudgment attachment of real property without prior notice or hearing was found to be unconstitutional by this Court. The issue presented in the Doehr case was whether the state statute authorizing prejudgment attachment violated the due process of the United States Constitution.

The present action does not involve a state prejudgment attachment statute, but rather involves a postjudgment foreclosure sale of mortgaged prop-

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[4]The mortgaged premises has already been sold at sheriff's sale on September 3, 1991 and Respondent was the successful purchaser. Accordingly, the Questions Presented for Review in the Petition are, at best, moot issues and should not be considered by this Court.

erty. Petitioners received notice of the sheriff sale and were afforded numerous prejudgment hearings to present their defenses before the Court of Common Pleas of Westmoreland County, Pennsylvania.[5] If this Court were to accept as true Petitioners' allegations that they were not notified of the mortgage foreclosure action, the numerous hearings or the foreclosure sale, then the Court must question how Petitioners knew to file two sets of Preliminary Objections and several briefs in opposition to Respondent's Motion for Summary Judgment and in support of their own Cross-Motion for Summary Judgment. The record reflects that Petitioners were afforded more than minimal due process prior to the entry of judgment. Accordingly, the present action is clearly distinguishable from the Doehr case.

The decisions of the Pennsylvania courts in this case were correct and rest on independent nonfederal grounds. Petitioners' challenge to the Pennsylvania Rules of Civil Procedure, particularly Rules 1038 and 1150, is unfounded and was waived by Petitioners when they failed to raise this issue with the Court of Common Pleas or Superior Court of

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[5]On or about December 28, 1988 Petitioners' First Set of Preliminary Objections was heard by the Honorable Joseph A. Hudock. On or about April 6, 1989, Petitioners' Second Set of Preliminary Objections was heard by the Honorable Donetta W. Ambrose. On or about September 12, 1990 argument was conducted on Respondent's Motion for Summary Judgment before the Honorable Daniel J. Ackerman. On or about October 26, 1990, argument was conducted on Petitioners' Cross-Motion for Summary Judgment before the Honorable Richard E. McCormick.

Pennsylvania.[6] Rule 1038 establishes the manner in which a nonjury trial is to be conducted in Pennsylvania. Rule 1150 provides that in cases where foreclosure actions are tried by a judge sitting without a jury, the trial shall be conducted in accordance with Pennsylvania Rule of Civil Procedure 1038. This case did not proceed to trial due to the fact that summary judgment was entered in favor of Respondent. Accordingly, these Rules of Civil Procedure are irrelevant to this action. Furthermore, there is no basis in the United States Constitution or in case law interpreting procedural due process to justify a finding that the referenced Pennsylvania Rules of Civil Procedure are unconstitutional.

The decisions from the Pennsylvania courts are well reasoned and rest exclusively on independent nonfederal grounds. The Petition fails to identify any basis for this honorable court to grant the Petition for Writ of Certiorari. The Petition for Writ of Certiorari is a mere reiteration of the meritless arguments advanced by Petitioners in the courts below and does not present a constitutional or other significant issue to justify this Honorable Court's review of the prior proceeding in this mortgage foreclosure case.

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[6]Respondent raises the Petitioners' waiver of these issues prior to argument to oppose the grant of review pursuant to City of Canton, Ohio v. Harris, 489 U.S. 378, 379, 109 S. Ct. 1197, 1199, 103 L.Ed 2d 412 (1989).

CONCLUSION

The Petition for Writ of Certiorari filed by Petitioners David Jones and Catherine Jones should be denied.

Respectfully submitted,
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